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NO. 89-1640

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IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1989

TERRY RAY SLUDER and TINA SLUDER,  
*Petitioners,*

versus

UNITED MINE WORKERS OF AMERICA,  
INTERNATIONAL UNION,  
UNITED MINE WORKERS OF AMERICA,  
DISTRICT 12,  
JOHN DOE, and TOM ROE,  
*Respondents.*

**BRIEF IN OPPOSITION TO PETITION FOR  
WRIT OF CERTIORARI TO THE  
UNITED STATES COURT OF APPEALS  
FOR THE SEVENTH CIRCUIT**

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**STATEMENT OF THE CASE**

Petitioners, Terry and Tina Sluder (hereinafter referred to as "Petitioners"), originated this action by filing a two count complaint in the Circuit Court of Sangamon County of the State of Illinois bearing the number 86 L 464 against United Mine Workers of America, District 12 (hereinafter referred to as "District 12") and two unknown defendants alleged to be agents of District 12. No summons was issued on that

Complaint and Plaintiffs moved to amend the Complaint adding United Mine Workers of America (hereinafter referred to as "International") as Defendants and adding a third count to the Complaint. Plaintiffs also filed another original Complaint identical to the Amended Complaint in the Circuit Court of Sangamon County of the State of Illinois bearing the number 87 L 32. Both the Amended Complaint and the second Complaint were served upon District 12 and the International.

Count I and II of the Complaint purported to allege a state law negligence claim against District 12. Count III of the Amended Complaint alleged a federal cause of action founded upon Section 301 of the Labor Management Relations Act, 29 U.S.C., §185 against District 12 and the International.

District 12 and the International filed a petition for removal of the above-mentioned State Court actions to the United States District Court for the Central District of Illinois, alleging as the basis for removal that the Complaints in their entirety arose under federal law, Section 185 of Chapter 29 of the United States Code and therefore properly removed pursuant to Section 1441(b) of Chapter 28 of the United States Code. The International then filed a motion to dismiss Count III of the Complaint, the only count naming the International, stating that Count III should be dismissed on three bases: Plaintiffs' allegations were conclusory, not factual; Plaintiffs did not plead intentional conduct on the part of the Union; and the collective bargaining agreement did not create a duty for which Plaintiffs could claim a breach.

District 12 filed a motion to dismiss all counts of the Complaint, stating that Counts I and II should be dismissed in that the purported state tort causes of action were in reality federal law claims under Section 301 of the Labor Management Relations Act, 29 U.S.C. 185, and were there-

fore preempted by federal law. District 12's arguments as to the dismissal of Count III were the same as the arguments of the International.

Petitioners did not move to remand the Complaints. The District Court by adopting the recommendation of the Magistrate granted the petition for removal of District 12 and the International finding that all counts of the Complaints arose under federal law, 29 U.S.C. 185. The District Court, by adopting the Magistrate's recommendation, granted District 12's motion to dismiss Counts I and II of the Complaints finding that those counts are preempted by Section 301 of the Labor Management Relations Act. Petitioners were given thirty days to file an amended complaint. The motions to dismiss Count III were denied.

Petitioners did not file an amended complaint. Petitioners did file a motion requesting that the Order of the District Court dismissing Counts I and II be made final or in the alternative be amended to permit a discretionary appeal. The District Court denied the motion of Petitioners. Thereafter, District 12 and the International filed an answer to Count III of the Complaint.

Petitioners then moved to dismiss Count III of the Complaint with prejudice and for entry of final judgment on Counts I and II. The District Court granted the motion of Petitioners, dismissed Count III with prejudice and made final its previous Order dismissing Counts I and II of the Complaint.

Petitioners appealed from the Order of the District Court dismissing Counts I and II of the Complaints. The only defendant from which relief is sought in those counts is District 12. Thus, there is no pending action against the International and the International was not a party to the appeal to the Court of Appeals and is not properly a party to this Petition For Certiorari.

## ARGUMENT

Petitioners seek review of the judgment and opinion of the Seventh Circuit Court of Appeals holding that Counts I and II of the Petitioners' Complaint, which purport to allege a cause of action for personal injuries based upon a negligence theory, were preempted by Section 301 of the Labor Management Relations Act of 1947, 29 U.S.C. §185. Petitioners argue that review is warranted, in the main, due to an opposite conclusion having been reached in a similar case by the Idaho Supreme Court in *Rawson v. United Steelworkers*, 115 Idaho 785, 770 P.2d 794 (1988), *rev'd.*, \_\_\_\_ U.S. \_\_\_\_, \_\_\_\_ S.Ct. \_\_\_\_, 58 U.S.L.W. 4556 (U.S., May 14, 1990), and the perceived failure of the Court of Appeals to correctly apply prior decisions of this Court.<sup>1</sup> The Opinion of this Court in *United Steelworkers v. Rawson*, \_\_\_\_ U.S. \_\_\_\_, \_\_\_\_ S.Ct. \_\_\_\_, 58 U.S.L.W. 4556 (U.S., May 14, 1990), *reversing Rawson v. United Steelworkers*, 115 Idaho 785, 770 P.2d 794 (1988), disposes of the issue raised by Petitioners. Thus, the Petition For Writ Of Certiorari must be denied.

## COUNTS I AND II OF THE COMPLAINT ARE PREEMPTED BY FEDERAL LAW.

Section 301(a) of the Labor Management Relations Act, 29 U.S.C. §185(a) provides:

Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this Act, or between any such labor organizations, may be brought

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<sup>1</sup>The Petition For Writ Of Certiorari was filed prior to the Opinion of this Court in *United Steel Workers v. Rawson*, \_\_\_\_ U.S. \_\_\_\_, \_\_\_\_ S.Ct. \_\_\_\_, 58 U.S.L.W. 4556 (U.S., May 14, 1990), *reversing* 115 Idaho 785, 770 P.2d 794 (1988).

in any District Court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

This Court has held that Section 301 mandates the application of federal rules of law to ensure uniform interpretation of labor agreements in order to effectuate the policies of the labor statutes to promote peaceable, contractual resolution of labor-management disputes. *Teamsters v. Lucas Flour*, 369 U.S. 95, 103-104 (1962).

Several recent decisions of this Court have considered the scope of the preemption doctrine set forth in *Teamsters v. Lucas Flour*, 369 U.S. 95 (1962). In *Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202 (1985) and *International Brotherhood of Electrical Workers v. Hechler*, 481 U.S. 851, 107 S.Ct. 2161 (1987) the Court held that the state law claims at issue were preempted by Section 301, in that the claims, although founded in tort rather than contract, were inextricably intertwined with the interpretation of a labor agreement.

In *Caterpillar, Inc. v. Williams*, 482 U.S. 386, 107 S.Ct. 2425 (1987) and *Lingle v. Norge Div. of Magic Chef*, 486 U.S. 399, 108 S.Ct. 1877 (1988), this Court held that the claims at issue were not preempted. In each of those cases the Court held that, although a collective bargaining relationship existed the claims at issue, breach of individual employment contracts and a statutory claim of retaliatory discharge, respectively, were independent of the collective bargaining relationship and therefore not subject to preemption.

In *United Steelworkers v. Rawson*, \_\_\_\_ U.S. \_\_\_\_, \_\_\_\_ S.Ct. \_\_\_\_, 58 U.S.L.W. 4556 (U.S., May 14, 1990), reversing *Rawson v. United Steelworkers*, 115 Idaho 785, 770 P.2d 794 (1988), the most recent decision of this Court

on this issue, it was held that the tort claim presented therein, a claim of negligent inspection of a mine, was preempted by §301 of the LMRA. District 12 submits that the holding in that case is dispositive of Petitioners' arguments herein.

Petitioners argue that Counts I and II of their Complaint are founded solely upon a state law tort theory, namely negligent performance of a voluntary undertaking. Petitioners conclude that any interpretation of the collective bargaining agreement is unnecessary to determine the claims presented under that theory. The decision of this Court in *United Steelworkers v. Rawson*, \_\_\_\_ U.S. \_\_\_\_, \_\_\_\_ S.Ct. \_\_\_\_, 58 U.S.L.W. 4556 (U.S., May 14, 1990), reversing *Rawson v. United Steelworkers*, 115 Idaho 785, 770 P.2d 794 (1988), requires an opposite conclusion.

The Supreme Court of Idaho in *Rawson v. United Steelworkers*, 115 Idaho 785, 770 P.2d 794 (1988), *rev'd.*, \_\_\_\_ U.S. \_\_\_\_, \_\_\_\_ S.Ct. \_\_\_\_, 58 U.S.L.W. 4556 (U.S., May 12, 1990) found that the claims therein were not preempted by federal law in that the actual inspection by the union created the duty of the union. *Id.* at 787, 770 P.2d at 796. This Court rejected that rationale, stating:

As we see it, however, respondents' tort claim cannot be described as independent of the collective bargaining agreement. This is not a situation where the Union's delegates are accused of acting in a way that might violate the duty of reasonable care owed to every person in society. There is no allegation, for example, that members of the safety committee negligently caused damage to the structure of the mine, an act that could be unreasonable irrespective of who committed it and could foreseeably cause injury to any person who might possibly be in the vicinity.

*United Steelworkers v. Rawson*, \_\_\_\_ U.S. \_\_\_\_, \_\_\_\_ S.Ct. \_\_\_\_, 58 U.S.L.W. 4556 at 4558 (U.S., May 14, 1990).

This same approach was utilized by the Court below in the case at bar. The only allegations against District 12 were for carelessly and negligently failing to report, warn or act in connection with the alleged inspection. Petitioners claim that the duty of District 12 arises from the actual alleged inspection under Illinois law. The Court of Appeals reviewed Illinois law governing the imposition of liability for a voluntary undertaking. The Court stated:

We have noted that "[u]nder controlling Illinois law, liability may arise from the negligent performance of a voluntary undertaking." *Homer v. Pabst Brewing Co.*, 806 F.2d 119, 121 (7th Cir. 1986) (citing *Pippin v. Chicago Housing Auth.*, 78 Ill.2d 204, 35 Ill. Dec. 530, 399 N.E.2d 596 (1979), and *Nelson v. Union Wire Rope Corp.*, 31 Ill.2d 69, 199 N.E.2d 769 (1964)). However, we have stressed that "the scope of the duty is limited by the extent of the undertaking." *Id.* (citing *McColgan v. United Mine Workers*, 124 Ill.App.3d 825, 80 Ill. Dec. 183, 464 N.E.2d 1166 (1984)). "Illinois courts have carefully examined the nature of a defendant's undertaking, imposing a duty only to the extent actually assumed by the defendant." *Id.* Indeed, Illinois courts "require that any duty assumed be limited strictly to the scope of the undertaking." *Figueroa v. Evangelical Covenant Church*, 879 F.2d 1427, 1435 (7th Cir. 1989) (emphasis supplied).

*Sluder v. United Mine Workers*, 892 F.2d 549 at 533, 554 (7th Cir. 1989).

The Court went on to find therefore that before liability could be established it would be necessary to establish that the union breached a specific duty it assumed toward the employees and such a duty could not be defined without reference to the collective bargaining agreement. *Id.* at 554.

Thus, the factual allegations and arguments of Petitioners herein are indistinguishable from the claims made by the

plaintiffs in *United Steelworkers v. Rawson*, \_\_\_\_ U.S. \_\_\_\_, \_\_\_\_ S.Ct. \_\_\_\_, 58 U.S.L.W. 4556 (U.S., May 14, 1990), reversing *Rawson v. United Steelworkers*, 115 Idaho 785, 770 P.2d 794 (1988). The result must be the same. Counts I and II of the Complaint were properly dismissed as preempted by federal law.

### **"ARTFUL PLEADING" CANNOT BE USED TO AVOID PREEMPTION.**

Petitioners also argue that Counts I and II on their face do not allege a Section 301 action and the courts below erred in using the allegations of Count III as a method of determining the validity of Counts I and II. It is correct that Petitioners did not mention the collective bargaining agreement in Counts I and II of their Complaint. However, the fact that Petitioners did not mention the collective bargaining agreement does not negate the reality that any duty which District 12 may have owed to Petitioner is necessarily governed by its status as a collective bargaining representative of Petitioner as set forth in the terms of the collective bargaining agreement.

In short, Petitioners cannot "artfully plead" a state law cause of action and thereby avoid preemption by merely failing to mention that the duty arises from a collective bargaining agreement. *Ogelsby v. RCA Corp.*, 752 F.2d 272 (7th Cir. 1985). A court may appropriately in that situation look outside the mere allegation of the claims in question to determine whether the questioned claims are an attempt at artful pleading to avoid the pleading of a federal cause of action. As the District Court noted, Petitioners in their own memorandum in opposition to the motion to dismiss argued that the duty of District 12 arose from the collective bargaining agreement and alleged in Counts I and II that District 12 carelessly and negligently failed to close the

mine, a duty which could only arise from an agreement with the Employer.

Petitioners further argue that the Court of Appeals erred in reviewing the collective bargaining agreement when the agreement was not contained in the record at the time of the granting of the motion to dismiss. As noted by the Court of Appeals the collective bargaining agreement was in the record at the time a final judgment was entered by the District Court thus allowing review by the Court of Appeals. *Sluder v. United Mine Workers*, 892 F.2d 549, 555 n. 8 (7th Cir. 1989); *Marzuki v. AT&T Technologies*, 878 F.2d 203, 207 (7th Cir., 1989). Further, Petitioners set forth the applicable portions of the collective bargaining agreement in Count III of the Complaint and the Court could correctly review the Complaint in its entirety.

Petitioners also argue that District 12's motion to dismiss Count III of the Complaint alleging that no duty existed under the collective bargaining agreement acknowledges agreement by District 12 with Petitioners' position that the collective bargaining agreement does not define the duty of District 12. Petitioners misstate the argument of District 12 and the context in which it was made.

It is correct that District 12 argued below that Petitioners could not state a claim under Section 301 alleging that the collective bargaining agreement does not confer a duty upon District 12 to Petitioners for which District 12 could be held liable. This argument was based on interpreting the collective bargaining agreement to determine what if any duty exists and the scope and nature of the contractual obligation. District 12 argued that the language of the contract is permissive not obligatory, citing *Bryant v. United Mine Workers*, 467 F.2d 1 (6th Cir., 1972), *cert. denied*, 410 U.S. 910 (1973). As stated by the Court in that case, to impose potential liability upon a union for failing to guarantee mine safety would undermine any possibility for improving condi-

tions of coal mines. *Bryant v. United Mine Workers*, 467 F.2d 1, 5 and 6 (6th Cir. 1972), *cert. denied*, 410 U.S. 910 (1973).

Petitioners here are asking this Court to go further than what the *Bryant* Court recognized would be a gross misjustice in terms of labor policy. Petitioners are asking this Court to find that the Union has a duty and therefore a liability separate from the collective bargaining relationship and collective bargaining agreements with the employer. Such a result would clearly violate federal policy in connection with mine safety and cause all unions to decline to consider safety as a subject of negotiation, form joint committees with employers, report any violation of safety laws or regulations or in any way concern the union with safety in the workplace. It is just that result that the Court in *Bryant* wished to avoid as did the Illinois Appellate Court in *McColgan v. United Mine Workers*, 124 Ill.App.3d 825 (1984).

This Court has already responded to that question in *United Steelworkers v. Rawson*, \_\_\_\_ U.S. \_\_\_\_, \_\_\_\_ S.Ct. \_\_\_\_, 58 U.S.L.W. 4556 (U.S., May 14, 1990), *reversing Rawson v. United Steelworkers*, 115 Idaho 785, 770 P.2d 794 (1988), by stating:

If the Union failed to perform a duty in connection with inspection, it was a duty arising out of a collective bargaining agreement signed by the Union as the bargaining agent for the miners. Clearly, the enforcement of that agreement and the remedies for its breach are matters governed by federal law. . . . Pre-emption by federal law cannot be avoided by characterizing the Union's negligent performance of what it does on behalf of the members of the bargaining unit pursuant to the terms of the collective bargaining contract as a state-law tort.

*Id.* at 458 U.S.L.W. 4559.

## CONCLUSION

Based on the foregoing arguments, District 12 respectfully requests the Petition be denied.

Respectfully submitted,

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